

STATE OF MICHIGAN

SUPREME COURT

CHRISTOPHER D. BENTFIELD,

Plaintiff/Appellant,

-VS-

BRANDON'S LANDING BOAT BAR,
DAVID WATTS, INC. a Michigan
Corporation and DAVID WATTS,
an individual.

Defendants/Appellees.

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Supreme Court No. 127515

Court of Appeals No. 248795

Oakland County Circuit Court
No. 02-039613-NO
Hon. Colleen A. O'Brien

DEFENDANT/APPELLANT'S SUPPLEMENTAL BRIEF
IN SUPPORT OF DEFENDANT/APPELLANT'S
APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

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I. INTRODUCTION

Defendant/Appellant filed its Application for Leave to Appeal on or about November 30, 2004. Plaintiff/Appellee filed his initial Brief in Opposition to Appeal from Judgment on or about December 15, 2004. On June 17, 2005, this Honorable Court issued an Order instructing the clerk to schedule oral argument on whether to grant the application or take

other peremptory action. **(Exhibit A)**. Per this Order, the parties were instructed that they may file supplemental briefs discussing the issue of the “standard of review when a trial court denies a motion for reconsideration that alleges a new cause of action that was available prior to the court’s original ruling.” Plaintiff/Appellee filed his Supplemental Brief in Opposition to Appeal from Judgment on or about July 11, 2005. This document is Defendant/Appellant’s supplemental brief pursuant to this Honorable Court’s June 17, 2005 Order.

II. STATEMENT OF ORDER BEING APPEALED AND RELIEF SOUGHT

Defendant/Appellant relies on its statement provided in its initial Application for Leave to Appeal.

III. STATEMENT OF QUESTIONS PRESENTED

WHETHER PLAINTIFF CAN ALLEGE A NEW CAUSE OF ACTION IN A MOTION FOR RECONSIDERATION, DESPITE THE FACT THAT THE NEW CAUSE OF ACTION WAS AVAILABLE BEFORE THE TRIAL COURT’S ORDER GRANTING SUMMARY DISPOSITION.

Defendant/Appellant answers “no.”

Plaintiff/Appellee answers “yes.”

Trial Court answered “no.”

Court of Appeals answered “yes.”

IV. STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Defendant/Appellant relies on the content in its initial Application for Leave to Appeal.

V. SUPPLEMENTAL ARGUMENT IN SUPPORT OF GRANTING LEAVE TO APPEAL OR PEREMPTORILY REVERSING THE ORDER OF THE APPELLATE COURT

Although Defendant/Appellant has found no case law that specifically sets forth the standard of review when a trial court denies a motion for reconsideration that alleges a new cause of action that was available prior to the court's original ruling, Defendant/Appellant's Application for Leave to Appeal presented ample case law stating, specifically, the standard of review of a trial court's ruling on a motion for reconsideration. Many of the cases cited in the Application for Leave to Appeal specifically dealt with a trial court denying a motion for reconsideration that alleged a new issue or new cause of action that was available prior to the court's original ruling.

Defendant/Appellant will not make a mere restatement of the arguments made in its application papers, but will simply list some of the cases that it feels are persuasive on the issue to be addressed at oral argument as stated in this Honorable Court's June 17, 2005 Order. The Michigan Appellate Court in Charbeneau v Wayne County General Hosp., 158 Mich App 730 (1987) stated at page 733:

Generally, a motion for rehearing or reconsideration must demonstrate a "palpable error by which the court and the parties have been misled." MCR 2.119(F)(3). Grant or denial of a motion for reconsideration rests within the discretion of the trial court. *Id.* **We find no abuse of discretion in denying a motion resting on a legal theory and facts which could have been pled or argued prior to the trial court's original order.** (Emphasis Added).

The standard of review used by the Charbeneau court was abuse of discretion.

The United States Court of Appeals, 6th Circuit, addressed the issue of a trial court that denied a motion for reconsideration that alleged a new theory that was available prior to the court's original ruling in American Meat Institute v Pridgeon, 724 F.2d 45, (1984). Although the court in that case did not specifically state a standard of review, it stated at

page 47, “By bringing this issue before the District Court in such an **untimely fashion**, defendants effectively waived their argument on severability and have no basis to assign failure to sever as an error on this appeal.” (Emphasis added).

The United States Court of Appeals, 6th Circuit, did provide a standard of review for a case that involved a trial court that denied a motion for reconsideration that alleged a new theory that was available prior to the court’s original ruling. Although this case is unpublished, when considered in conjunction with the other case law cited in this brief, the decision of Insurance Company of North America v Dynamic Construction Company, 106 F3d 400, (1997) WL 14417 (6th Cir.) (Mich) (**Exhibit B**), is certainly persuasive. The court in that case stated that an abuse of discretion standard would apply under both Federal and Michigan law. The U.S. Court of Appeals, 6th Circuit, stated:

Mr. Kowal did not raise the issue of the reasonableness of the attorney fees until he moved for reconsideration. The issue was raised too late to be preserved for appeal. Even if the issue were properly before us we would uphold the award. ***An abuse of discretion standard would apply under both Federal and Michigan Law.*** [,] and we are satisfied, based on an independent review of the itemized fees, that no abuse of discretion occurred here. Mr. Kowal asks us to examine several other issues pertaining to the fee award, but we decline to do so. **These issues were raised for the first time on appeal, or, at the earliest, in the motion for reconsideration and have thus been waived.** (Emphasis added).

Id. at 1-2.

The Michigan Court of Appeals in Churchman v Rickerson, 240 Mich App 223, (2000) used the abuse of discretion standard regarding affidavit testimony that was presented for the first time during a motion for reconsideration. The Churchman court stated at page 233:

Plaintiff's final argument is that the trial court erred in denying the motion for reconsideration. We disagree. **This court reviews a trial court's decision concerning a motion for reconsideration for an abuse of discretion.** Cason v Auto Owners Ins. Co., 181 Mich App 600, 609-610, 450 NW2d 6 (1989). An abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion. Schoensee v Bennett, 228 Mich App 305, 314-315, 577 NW2d 915 (1998). . . . **However, we can find no abuse of discretion in the denial of a motion for reconsideration that rests on testimony that could have been presented the first time the issue was argued.** Charbeneau v Wayne Co. General Hosp., 158 Mich App 730, 733, 405 NW2d 151 (1987). (Emphasis added).

Hernandez v Taylor Commons Ltd. Partnership, 2004 WL 1459527, (**Exhibit C**), an unreported case decided by Justices Cooper, Jansen, and Murphy, stated "We review for an abuse of discretion a trial court's ruling on a motion for reconsideration. Churchman v Rickerson, 240 Mich App, 223, 233; 611 NW2d 333 (2000). The Hernandez case was briefed at length in Defendant/Appellant's Application for Leave to Appeal. Importantly, Hernandez concerned the same issues as the case at bar: failure to preserve the issue of whether or not the open and obvious doctrine applies when a statutory duty is owed to an invitee who injured his ankle as a result of stepping in a pothole. Contrary to the case at bar, in Hernandez, both **Justices Cooper and Jansen**, along with Justice Murphy, affirmed the trial court's ruling that the open and obvious defense applied despite the statutory duty that Plaintiff raised for the first time in his motion for summary disposition. Please note that Hernandez was decided almost two months prior to the case at bar.

Although Plaintiff wants this Honorable Court to affirm the Court of Appeals' decision in the case at bar, it clearly contradicts the decision made by essentially the same panel in Hernandez. Plaintiff/Appellee asserts that the trial court in the case at bar demonstrated

palpable error. Plaintiff/Appellee's assertion is unfounded. Although Plaintiff/Appellee wants this Honorable Court to believe that the law was in a state of flux at the time that the motion for summary disposition in the instant matter was argued, he is misleading the court. Defendant/Appellant's Application for Leave to Appeal aptly pointed out that the case law utilized by Plaintiff/Appellee in his Motion for Reconsideration was definitely available before the Motion for Summary Disposition was argued, and furthermore, that additional case law was available prior to the filing of the Motion for Summary Disposition and Plaintiff/Appellee's response brief. Plaintiff/Appellee filed his response brief on or about March 19, 2003. The Woodbury v Bruckner, 467 Mich 922 (2002) Order of December 26, 2002, and the Jones v Enertel, 467 Mich 266 (2002) decision of September 17, 2002 were both available to Plaintiff prior to the filing of his response brief.

In the original Application, Plaintiff/Appellant cited the unpublished Michigan Court of Appeals opinion Neal v Kelly, 1997 WL 33344215 (Mich App). **(Exhibit D)**. The citation in the original Application illustrates the purpose of appellant preservation requirements and further illustrate the necessity for this Court to rule that the heightened standard of review when a trial court denies a motion for reconsideration that alleges a new cause of action that was available prior to the court's original ruling must be abuse of discretion.

In Plaintiff/Appellee's supplemental brief, he indicates that Michigan has a policy of allowing liberal amendments to pleadings. What Plaintiff/Appellee fails to state is that he **failed to file a motion to amend his complaint** to include the statutory violation so that the matter could be litigated in detail. It is improper for Plaintiff/Appellee to state that the trial court should have permitted or instructed him to amend his complaint when he failed to even raise the issue to the court.

The insinuation that Defendant/Appellant filed a frivolous motion is unfounded. Defendant/Appellant was not on notice that Plaintiff/Appellee was alleging the statutory violation. Furthermore, Plaintiff/Appellee failed to raise that issue with the trial court and consequently, he has waived that argument.

The court rule regarding motions for reconsideration, MCR 2.119(F)(3), provides:

Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

The phrase “motion for reconsideration” must be considered when deciding this issue. The trial court must not be compelled to **reconsider** an issue that was **never considered** in the first place. The highest standard of review must be used when a trial court denies a motion for reconsideration that alleges a new cause of action that was available prior to the court’s original ruling. The trial court cannot be expected to become an advocate for either side. Michigan case law does not reward a party with a second bite at the apple when they could have raised an issue that was available to Plaintiff/Appellee prior to the motion for reconsideration. Plaintiff/Appellee has not demonstrated a palpable error by which the **court and the parties** have been misled. Given the wording of the court rule, Plaintiff/Appellee must demonstrate that not only the court, but **Plaintiff/Appellee and Defendant/Appellant** were misled. He has simply failed to make such a demonstration.

Plaintiff/Appellee, in his supplemental brief, addressed more than just the standard of review when a trial court denies a motion for reconsideration that alleges a new cause of action that was available prior to the court’s original ruling. As a matter of fact,

Plaintiff/Appellee devoted very little attention to the issue to be addressed at oral argument. Defendant/Appellant has provided ample case law to support the proposition that the standard of review when a trial court denies a motion for reconsideration that alleges a new cause of action that was available prior to the court's original ruling is an abuse of discretion standard. The trial judge's ruling was **not** so palpably and grossly violative of fact and logic that it evidenced perversity of will or the exercise of passion or bias rather than the exercise of discretion. Churchman, supra. Accordingly, this Honorable Court should peremptorily affirm the trial court's order denying Plaintiff/Appellee's Motion for Reconsideration, or in the alternative grant leave to appeal, as the Court of Appeals committed error by reversing the trial court.

VI. CONCLUSION

An abuse of discretion standard should be used when a trial court denies a motion for reconsideration that alleges a new cause of action that was available to the prior court's original ruling. Michigan courts must be given guidance that assures a trial court that it can follow the Michigan case law by denying a motion for reconsideration that alleges a new cause of action that was available prior to the court's original ruling. In the case at bar, Plaintiff/Appellee failed to present the issue regarding a statutory duty in his response brief to Plaintiff's Motion for Summary Disposition or at oral argument. The first time it was raised was in Plaintiff/Appellee's Motion for Reconsideration. Contrary to his assertions, the case law necessary to plead the statutory duty was available prior to Defendant/Appellant's Motion for Summary Disposition. Plaintiff/Appellee failed to file a motion to amend his complaint. Neither the court nor either party were misled at oral argument for the motion for summary disposition. The trial court did not abuse its

discretion when it denied Defendant/Appellee's Motion for Reconsideration. The Court of Appeals committed error in its decision to reverse the trial court and The Court of Appeals' decision to deny Defendant/Appellant's Motion for Reconsideration. This Honorable Court should peremptorily reverse the Court of Appeals and reinstate the trial court's Order denying Plaintiff/Appellee's Motion for Reconsideration, or in the alternative, this Honorable Court should grant leave to appeal.

VII. RELIEF REQUESTED

For the reasons set forth in this Supplemental Brief in Support of Defendant/Appellant's Application for Leave to Appeal and those reasons in Defendant/Appellant's original Application for Leave to Appeal, Defendant/Appellant respectfully requests this Honorable Court peremptorily reverse the Court of Appeals decisions in this case and allow the decisions of the trial court to stand or in the alternative to grant leave to appeal.

Respectfully submitted,

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